BLANK PAGE

FILE COPY

BRIEF OF APPELLANT

Supreme Court of the United States

OCTOBER TERM, 1940

No. 377

HIRAM R. EDWARDS,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Clayton E. McCutcheon
J. FORREST McCUTCHEON,
1005 Texas Bank Building,
Dallas, Texas,
Attorney for Appellant.

OKLAHOMA LAW BRIEF PUBLISHING CO., 610 N. HUDSON, OKLAHOMA CITY

BLANK PAGE

SUBJECT INDEX

SUBJECT INDEX (Continued)

TABLE OF CASES

TABLE OF CASES (Continued)

TABLE OF STATUTES

BLANK PAGE.

Supreme Court of the United States

OCTOBER TERM, 1940

No. 377

HIRAM R. EDWARDS,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF APPELLANT

STATEMENT OF THE CASE

For the sake of brevity, Hiram R. Edwards is herein referred to as Appellant and the United States of America as Appellee.

This is an appeal from the judgment of the Circuit Court of Appeals for the Tenth Circuit and the judgment and sentence of the United States District Court for the Western District of Oklahoma, wherein appellant herein, Hiram R. Edwards, was found guilty, after plea of *nolo contendere*, for violation of Sec. 77, e and q, Title 15, U.S.

C.A.; Sec. 338, Title 18, U.S.C.A.; and Sec. 88, Title 18, U.S.C.A.; and on the 29th day of January, 1940, was sentenced by the trial court to serve three years on each count of the indictment, the sentences of confinement to run concurrently, in a penitentiary to be designated by the Attorney General. (R. 49).

The indictment was filed in court on the 15th day of November, 1938, and was signed by John Brett, Assistant United States Attorney. The indictment was not signed by the foreman of the Grand Jury, but was endorsed by one Ernest W. Clarke, "Foreman." (R. 39).

The indictment contains eleven counts, the first and second counts charging the sale of securities in various Oklahoma trusts by use of the United States mails and in connection therewith in employing a device, scheme and artifice to defraud in violation of Sec. 17 (a) (1) of the Securities Act of 1933, as amended, (Sec. 77q, Title 15, U. S. C.A.); the third count charging a violation of Sec. 17 (a) (2) of the Securities Act of 1933, as amended, (Sec. 77q, (a) (2), Title 15, U.S.C.A.); the fourth count charging a violaton of Sec. 5 (a) (1), of the Securities Act of 1933, as amended, (Sec. 77c, (a) (1), Title 15, U.S.C.A.); the fifth count charging a violation of Sec. 5 (a) (2) of the Securities Act of 1933, as amended, (Sec. 77e (a) (2), Title 15, U.S. C.A.); the sixth, seventh, eighth, ninth and tenth counts charging a violation of Sec. 338, Title 18, U.S.C.A.; and the eleventh count charging a violation of Sec. 88, Title 18, U.S.C.A., i. e., a conspiracy with one R. B. Binger to violate the Securities Act of 1933 and the mail fraud statute. (R. 4-39).

On December 16, 1938, appellant filed his demurrer to the indictment. (R. 39-41).

On December 16, 1938, appellant filed his plea in bar to the prosecution, setting forth in substance that he had been compelled to testify against himself under subpoena after having claimed his immunity against self-incrimination at a hearing before the Securities and Exchange Commission, in connection with the same matters and things which are the basis of the indictment herein and the connection of appellant therewith, and that by virtue thereof, in accordance with the Constitution of the United States and Section 22 (c) of the Securities Act of 1933, as amended, (Sec. 77 v (c) Title 15, U.S.C.A.), appellant was immune from prosecution and the government barred therefrom. Said plea in bar was duly verified and had attached thereto a letter from the General Counsel of the Securities and Exchange Commissior dated December 8, 1938 refusing the application of appellant for a copy of the transcript of the testimony of appellant in said hearings. (R. 41-45).

On February 28, 1939, appellee filed its motion to strike said plea in bar with objection to the production of said transcript, the same having attached thereto an affidavit of an attorney of the Securities and Exchange Commission. (R. 45-47).

On March 1, 1939, appellant filed his motion to strike said affidavit opposing said plea in bar. (R. 48).

On March 1, 1939, said demurrer and said plea in bar were presented to the trial court, overruled by the court, and exception taken and allowed. *The motion of appellee*

to strike the plea in bar was overruled and exception allowed. (R. 48).

Thereafter, on the 17th day of December, 1938, appellant entered a plea of not guilty (R. 49), but on October 25, 1939 he changed his plea of not guilty to a plea of *nolo contendere* (R. 49), and on January 29, 1940 was found guilty by the court and sentenced as above set forth. (R. 49-50).

The plea in bar of appellant was verified by oath and in substance alleged that on or about the 14th day of April, 1938, and on two later times, pursuant to subpoenas *duces tecum*, he appeared and testified before an officer of the Securities and Exchange Commission and after having claimed his immunity against self incrimination, as provided by Section 22 (c) of the Securities Act of 1933, as amended, and the Constitution of the United States, he was immune from prosecution and that by virtue of the foregoing the same should be barred. The plea refers to the proceedings as *hearings* (R. 41-45).

Appellant, in said plea in bar prayed the court to require the Securities and Exchange Commission to produce a transcript of his said testimony before said Commission and *that he be heard on the merits of his plea in bar* (R. 44). The Securities and Exchange Commission, by and through its General Counsel, under date of December 8, 1939, advised Counsel for appellant that the evidence adduced by the Commission had been transmitted to the Attorney General for criminal prosecution and that an indictment had been returned against appellant and the Commission refused to furnish a transcript of his testimony before such

hearing (R. 44-45). The trial court refused to hear appellant on the merits of the plea in bar, and as hereinbefore stated, the plea in bar was overruled by the trial court, to which appellant excepted (R. 48).

Appellee moved to strike appellant's plea in bar (R. 46-47), *which motion was not granted by the trial court* but was likewise overruled (R. 48).

Notice of Appeal under Rule III was duly given, (R. 50-51), setting forth the grounds of appeal, and thereafter appeal bond was duly filed (R. 51).

At the time of the argument of the cause before the Circuit Court of Appeals, appellee, by and through its United States Attorney for the Western District of Oklahoma, introduced in evidence and filed the same, *de novo*, over the objection of appellant, an affidavit of John Brett, Assistant United States Attorney for the Western District of Oklahoma (R. 52-53), and a purported transcript of matters before the Securities and Exchange Commission, which transcript was not signed by the Court. Reporter, nor was there any proof of the correctness of same (R. 53-69). This purported transcript was likewise introduced before the Appellate Court, *de novo*, without the right of cross-examination on the part of appellant and without any proof whatsoever of the correctness or authenticity of the exhibit introduced. *Neither were contained in the record from the trial court.*

Attention is directed to the affidavit introduced in evidence *de novo* before the Appellate Court, which, as above stated, *was not included in the record, nor introduced in evidence in the trial court*, wherein the affiant stated

that the trial court refused to receive said transcript in evidence and that the trial court stated that he did not care to see the transcript, "that he did not need them to pass upon the plea in bar, and that he was going to overrule the defendant's plea in bar." (R. 52-53). That is, the trial court, *without receiving any evidence whatever, was going to overrule said plea in bar*—and did.

The Appellate Court affirmed the judgment and sentence of the trial court on the 29th day of June, 1940 (R. 69-73), the opinion of the court being reported in 113 Fed. (2d) 286.

The Circuit Court of Appeals based its affirmance of the case substantially on the following grounds: (1) That the request of appellant for the Trial Court to compel appellee to furnish a transcript of the proceedings wherein he alleged that he testified under compulsion before the Securities and Exchange Commission after having claimed his immunity against self incrimination was a matter addressed to the discretion of the court and that the same was not herein abused by the denial of appellant's prayer and that even though Rule IV of the Rules and Regulations of the Commission, promulgated under Section 19 (a) of the Securities Act of 1933, providing that hearings shall be stenographically reported and that copies thereof shall be furnished to the parties at certain fixed prices and that even though there were references in the plea in bar to the proceedings as hearings, since there was no allegation that they were hearings appellant was not entitled to have a transcript of his testimony introduced in evidence; (2) that although appellant filed his plea in bar setting forth that he

had testified under compulsion before the Securities and Exchange Commission, after having claimed his immunity against self incrimination, under the provisions of Sec. 22 (c) of the Act, nevertheless, the record failed to indicate any evidence to sustain such allegations; (3) that the demurrer to the eleventh count of the indictment, i. e., the conspiracy count, which attacked that count on the ground of failure to charge that the securities in question were not of a class exempted under Sec. 3 of the Securities Act, was properly overruled, the Circuit Court holding that such exception need not be negatived in the indictment; (4) that inasmuch as the eleventh count of the indictment, i. e., conspiracy count, was good that it was unnecessary to explore the questions presented in the other counts inasmuch as where the sentences run concurrently and do not exceed that which was properly imposed upon the good count the judgment will stand (the Circuit Court of Appeals wholly failed to take into consideration that the maximum confinement that might be imposed on said "good count," i. e., conspiracy (Sec. 88, Tit. 18, U.S.C.A.), is two years instead of three years, on which appellant was sentenced to *three years* imprisonment); (5) that while it would have been better practice for the word "Foreman" in the endorsement on the indictment to be followed by the words "of the Grand Jury," the same was not essential to the validity of the indictment, no Federal Statute having been called to the Court's attention providing that the Foreman shall sign the indictment at the bottom thereof instead of endorsing the same on the back thereof simply with the word "Foreman" instead of "Foreman of the Grand Jury."

Petition for rehearing was filed on the 22nd day of July, 1940 (R. 75-78), and denied by the Circuit Court of Appeals on the same date. (R. 78).

Petition for writ of certiorari was filed in this Court on the 26th day of August, 1940 (R. 79), and the same granted on the 14th day of October, 1940 (R. 78).

SPECIFICATION OF ERRORS AND POINTS INVOLVED

(1) The Circuit Court of Appeals erred in holding that appellant was not entitled to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission, or to be heard on the merits of his plea in bar.

(2) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling appellant's plea in bar.

(3) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling appellant's demurrer to the indictment.

(4) The Circuit Court of Appeals erred in affirming the judgment of the trial court as to the sentence of appellant to imprisonment of *three* years on the eleventh count of the indictment, i. e., *conspiracy,* (violation of Sec. 88, Title 18, U.S.C.A.), and the judgment is contrary to law as to the entire indictment.

(5) The Circuit Court of Appeals erred in receiving in evidence, *de novo,* over the objection of appellant, certain exhibits and evidence not included in the record on appeal.

ARGUMENT

PROPOSITION NO. 1

(Specification of Errors Nos. 1 and 2)

The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein appellant's plea in bar and application to be heard on the merits thereof and to have produced in evidence thereof the transcript of his testimony before the Securities and Exchange Commission was overruled.

STATEMENT

As stated above, prior to the plea of appellant to the Indictment, he filed a plea in bar thereto and to the prosecution thereunder, setting forth that prior to the date of the Indictment, he appeared before the Securities and Exchange Commission at Fort Worth, Texas, and Oklahoma City, Oklahoma, pursuant to subpoena, and after having claimed his immunity against self-incrimination, testified against himself under oath pursuant to various questions propounded and asked him concerning Appellant's identity and relationship to the matters which were the subject of the prosecution herein. (R. 41-45).

Said plea in bar included an application seeking to compel Appellee to produce a transcript of Appellant's testimony against himself under such subpoena and compulsion before the said Securities and Exchange Commission.

There is attached to said plea in bar a letter from the General Counsel of the Securities and Exchange Commission refusing to provide Appellant with said transcript and also stating *that the evidence adduced by the Commission was transmitted to the Attorney General for criminal prosecution* and that an Indictment against Appellant concerning said matters had been returned. (R. 45).

As above stated, this plea in bar was overruled by the court and exception allowed by the court and the court refused to hear Appellant upon the merits of his plea in bar or to require Appellee to produce said transcript of the hearing before the Commission.

ARGUMENT

The Fifth Amendment to the Constitution of the United States, among other things, provides that "no person * * * shall be compelled in any criminal case to be a witness against himself."

We feel that it is practically unnecessary to present any lengthened argument pertaining to this portion of the Constitution, as the broad principle therein set forth has been so well passed upon by all of the courts. That principle has always been jealously protected and safeguarded. however, in passing, we respectfully call attention to the language of the Supreme Court in *Counselman* v. *Hitchcock*, 142 U. S. 562, 35 L. ed. 1110, wherein the Court stated:

> "Its (the Constitution) provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the Act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered

the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

"It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which if seeks to guard." (Italics that of the Court.)

In *Gould* v. *U. S.*, 255 U. S. 296, 65 Law Ed. 648, the Supreme Court of the United States, through Mr. Justice Clarke, stated as follows:

"The part of the 5th Amendment here involved reads:

" 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks* v. *United States*, 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep; 341, Ann. Cas. 1915C, 1177, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed

under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizens,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers.

* * * * * * * * * * * *

"The Second question reads:

"'Is the admission of such paper in evidence against the same person, when indicted for crime, a violation of the 5th Amendment?'

"Upon authority of the Boyd Case, supra, this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the 5th Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

See also *Sullivan* v. *United States,* 15 F. (2d) 809; and *United States* v. *Bell,* 81 Fed. 830.

The Securities Act of 1933, as amended, and particularly Section 22 (c) thereof, Section 77 v (c) Title 15 U.S.C.A.) provides as follows:

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; *but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise,* except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Italics supplied.)

There can be no question but that the foregoing provision of the Securities Act of 1933, is constitutional and, in fact, there is a long line of authorities holding that under the Fifth Amendment to the Constitution, Congress has the power to grant such immunity and amnesty to persons who appear and testify, under compulsion, in any criminal proceeding.

In the instant case, we have the verified and sworn plea of Appellant to the effect that he was compelled to appear before the Securities and Exchange Commission on three different occasions and that at said hearings he appeared under subpoena and was compelled to testify against himself and at the same time claimed his immunity against self-incrimination. In his plea in bar Appellant set forth that he testified under oath to various questions and mat-

ters concerning his identity and relationship to the matters for which he was indicted and later found guilty by the court, including matters pertaining to his personal entries, books, and records. His plea in bar has attached thereto a letter from the Securities and Exchange Commission stating that said evidence *had been transmitted to the Attorney General for criminal prosecution and that an Indictment had been returned.*

In the plea in bar Appellant requested that Appellee produce a transcript of Appellant's said testimony which the Government, for some unanswerable reason, objected to producing and feebly attached to their objection an affidavit of one of the attorneys of the Commission—*one of their own attorneys.*

The plea in bar of Appellant, duly verified, states that Appellant appeared before three *hearings* of the Commission and Appellee, in its motion to strike the plea in bar, in paragraph IV thereof, refers to the proceedings as "hearings." (R 43). Nowhere does Appellee allege or set forth that said proceedings were private investigations but, on the contrary, admits, in substance, that the proceedings were *hearings.*

The Securities Act of 1933 gives the Securities and Exchange Commission the power to make rules and regulations to carry out the provisions of the Act, (Section 77 s (a), Title 15, U.S.C.A.), and pursuant thereto the Commission promulgated the following rule which was in effect at the time of the testimony of Appellant before the Commission:

"Rule IV. Hearings; Evidence. * * *

"(c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter."

The question was passed on by the District Court of the Southern District of New York in 1936, in the case of *Securities and Exchange Commission* v. *Torr et al.*, 15 Fed. Supp. 144, and in the case of *In re Securities and Exchange Commission,* (C.C.A. 2d) 1936, 84 Fed. (2d) 316, and in those cases it was held that in a private investigation the party appearing before the Commission was not entitled to a copy of the transcript. Those were cases of private and secret investigations and not of a public hearing and the reason for refusing a copy of the private and confidential papers of the Government in such instances is readily obvious.

In the instant case, the only transcript requested was the record of the testimony of the Appellant *himself* which could not be secret insofar as Appellant was concerned and as the record shows by the affidavit of the attorney for the Securities and Exchange Commission Appellant's attorney, J. Forrest McCutcheon, was present at the various hearings (R. 47). *Such a proceeding is entirely different from a private and secret investigation.*

Irrespective of whether Appellant was entitled to have produced a copy of said transcript, we respectfully submit that the only desire of the Appellant in having the same before the court was for the *truth* to be known and that the

Government be not permitted to take an accused before one of its Commissions and in violation of his constitutional and legal rights, compel him to testify against himself under oath, pursuant to subpoena, and then when the accused comes into court and files his plea in bar to protect himself as he is legally entitled to do, engage itself in practices that if committed by an individual would almost be called chicanery by refusing to produce before the court documentary evidence of a court reporter to show the *truth* as to what actually happened.

Does this Court think for one moment that had not the allegations and averments of Appellant in his plea in bar been absolutely true, that he would have asked the court to produce the court reporter's record showing what actually happened in those three hearings? By the same token, if Appellee did not have something to hide, why didn't it come into court in response to Appellant's application and say: "Here is a *true and correct* copy of the Court Reporter's record, *duly certified,* which shows that you did not testify and incriminate yourself under oath as you swear that you did!"

There was nothing secret about these hearings. Appellant and his counsel were both present. We simply wanted the trial court to have the benefit of the exact testimony of Appellant against himself. On the contrary, apparently Appellee didn't want the court to know just what transpired in these hearings.

Appellee knew when this affidavit was attached to its motion to strike, that Appellant would not have the right of cross-examination. *The court refused to hear evidence*

in support of Appellant's plea in bar. The affidavit was not admissible in evidence.

In *Holt* v. *United States,* 94 Fed. (2d) 90, the same Appellate Court, in reversing the judgment and sentence of the same trial court herein, held that an *ex parte* statement and affidavit introduced in evidence was inadmissible and that the action of the court in permitting the same was reversible error.

Again, we say, that as a proposition of law, in addition of interest in the question of the *right* of Appellant to have had the transcript of the record above referred to, presented, we still wonder *why* Appellee did not want the court to see the record.

We are sensible of the needs of justice for the apprehension and prosecution of those who violate the law, but we are also sensible of the obligation of the Government to deal fairly with its citizens and not engage itself in double dealing.

Paraphrasing a part of the opinion of Mr. Justice Hutcheson in the case of *United States* v. *Pardue,* 294 Fed. 543, we respectfully say to the Court that the Draconian principle of writing the law in characters so fine that no one can read it and thereby placing the Government in a position to take the unwary ones into its net magnifies the fault of the accused while it minimizes the bad faith of the Government. As Mr. Justice Hutcheson so ably said: "It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves double dealing and evasion on the part of the Government in the matter of a man's constitutional protection, which

right reason and sound discrimination cannot, in my opinion, sustain."

This Government, as a free democracy, guided by an inspired and beloved Constitution, particularly in this day of stress, must not assume the role of Dr. Jekyll and Mr. Hyde.

The wisdom of the courts will not be misled.

The Government cannot ensnare an unsuspecting victim into its net and then, after he has testified against himself, under compulsion, attempt to prosecute him. This case was decided by Judge Hutcheson when on the District Court for the Southern District of Texas, now Justice of the Circuit Court of Appeals of the Fifth Circuit. In the Pardue Case, *supra*, Judge Hutcheson said:

> "This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—*the obligation of keeping faith with the individual. Whenever the time comes when the courts, in their eagerness to apprehend criminals, deny to the accused that which the laws and the Constitution give him; when men are convicted of offenses against their government, and in the process of that conviction every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more.* (Italics ours.)

"In what has been said it is not meant to hold that the mere fact of a subpoena confers an exemption. The controlling question is: Did he testify voluntarily, or upon compulsion; and it is in my opinion immaterial in law whether the witness testified under a subpoena or was called without a subpoena and put upon the stand upon compulsion by the government. *Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion,* if a witness appears under a subpoena and is placed upon the stand by the government, *the fact of compulsion is prima facie established,* and the *burden shifts to the government to show that, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege, and testified voluntarily.*" (Italics that of the court.)

The fact that Appellant entered a plea of *nolo contendere* and none of the testimony which he had given against himself, under compulsion before the Commission, was actually introduced in evidence in a trial against him, cannot excuse Appellee or avail it of the position that he has not, therefore, been harmed.

The Securities Act, Section 22 (c), quoted *supra*, does not say that the evidence must actually be used in a trial against the accused, nor that he is required to await its possible use or offer in evidence, and then object to protect himself, but, on the contrary, the Securities Act provides that when he appears under compulsion and claims his immunity against self-incrimination and is compelled to testify, as here, that he *shall not be prosecuted* for or on account of any transaction, matter or thing concerning which he was compelled to testify about. (Section 77v (c), Title 15, U.S.C.A.). There is, therefore, no question but that

when Appellant testified before the Commission and claimed his immunity against self-incrimination as set forth in his verified plea in bar, the protection afforded him by the Constitution and Section 22 (c) of the Securities Act, attached then and there without further objection or act on his part.

Anticipating that Appellee might urge that Appellant did not prove or establish his allegations in his plea in bar, we say that the plea of Appellant was duly verified and that the responsive pleadings of Appellee were *overruled* by the court and that the court *did not sustain* Appellee's response to Appellant's plea in bar. Appellant asked the court to be heard on the merits of his plea in bar to require Appellee to produce the transcript of his testimony before the Commission. Assuming that the court did not err in compelling Appellee to produce said transcript, there is no question but that the Court erred in refusing to hear testimony and evidence from Appellant and his witnesses to establish the allegations in his plea in bar.

The motion of Appellee to strike the plea in bar is not based on a question of law; it is founded on a question of fact, and which motion to strike of Appellee the court did not sustain.

The law is for the purpose of guarding against injustice to the people. Law was not made for logicians or magicians. Law and justice should be interpreted and measured by the courts in the same manner that those interpreting the same would consider in the ordinary and weighty problems of their daily life, without technicalities, folderols or quibbles. In other words, when Appellant

filed his plea in bar and requested a transcript of his testimony before the Commission and when Appellee objected to the production of the transcript, we have, in effect, the following situation: Appellant said, "I want the record because I am right—if I were wrong, I wouldn't demand the record." Appellee said—"We don't want you to have the record because we know we are wrong and you are right——If you were wrong and we were right, we would gladly produce the record."

Appellant demanded the record—Appellee refused it.

We submit that it cannot be urged seriously by Appellee that since Appellant entered a plea of *nolo contendere* he waived his constitutional and legal rights of immunity. A constitutional right of an accused cannot be waived except expressly and which, of course, is not the case here. Appellant retained and still retains his constitutional rights and, as a matter of fact, under his plea of *nolo contendere* could have been found not guilty by the court, or the case dismissed. A plea of *nolo contendere* is, in fact, no plea whatsoever, except that it is commonly understood to be "I do not contend," entered with leave of the court. (*United States* v. *Tucker*, 196 Fed. 260), and, in fact, in this case, Appellant's co-defendant, R. B. Binger, entered a plea of *nolo contendere* along with Appellant and the charges against him were *dismissed* by the court. (R. 50).

The verified plea in bar of Appellant presents the situation of his having testified against himself at a hearing before the Securities and Exchange Commission, under compulsion, and, after having claimed his immunity against self-incrimination, the testimony being in connection with

and relating to the matters and things for which he was indicted and convicted. The record further shows that the reply of Appellee to said plea in bar was *overruled by the court and in no wise sustained.* We say, therefore, that the plea in bar should have been granted and that the court's action in *not hearing testimony in support thereof* and in overruling said verified plea in bar when it had overruled the objection of Appellee was error and that the judgment and sentence of the court herein should be reversed.

The Circuit Court of Appeals took the viewpoint that Rule IV, *supra,* had no application to testimony taken in the course of investigations as distinguished from *hearings* and cites as authority therefor the cases: *In re Securities and Exchange Commission,* 84 F. (2d) 316, and *Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 144, referred to *supra.* These were cases wherein the proceedings before the Commission were in fact *investigations* whereas in the instant case the proceedings were referred to as *hearings* and the reference to the proceedings as such was not disputed by Appellant.

It is readily to be seen why a transcript of the proceedings in a *secret investigation* would be withheld, but where the proceeding was one wherein appellant's counsel was present, as in the instant case then we have an entirely different situation and we respectfully submit that such proceeding is a *hearing* within the meaning of the law and the rules and regulations of the Commission and that, as such, appellant was entitled to have produced in evidence a copy of the transcript of his testimony at such hearing as pro-

vided for by Rule IV of the rules and regulations of the Commission, and that it was error for the trial court to refuse appellant's request therefor, in order to give him an opportunity to test the correctness of the purported transcript that might be presented under the proper rules of evidence governing introduction of such documents and instruments, instead of appellant being at the mercy of the Circuit Court of Appeals in receiving in evidence, *de novo*, a purported copy of the same, *uncertified* to by the Court Reporter, and with no showing whatsoever that the same was a true and correct copy of what it purported to be as was done here.

We respectfully submit, therefore, that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court and in approving the action of the trial court in overruling appellant's plea in bar and *his application to be heard on the merits thereof* and to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission in order that his counsel might have the right of cross-examination concerning the same and the right of testing its correctness and authenticity and we respectfully say that the opinion, and the judgment of the Circuit Court of Appeals herein in connection with the foregoing was and is contrary to the law and violative of the Constitutional rights of appellant and that the judgment of the Circuit Court of Appeals herein should be reversed.

PROPOSITION NO. 2

(Specification of Error No. 3)

The Indictment was invalid and the demurrer of appellant thereto should have been sustained by the trial court.

STATEMENT

An abstract of the charges contained in the Indictment is set forth in the Statement of the Case, *supra,* and therefore it is not deemed necessary to repeat the same. However, we briefly refer to the alleged schemes and ventures charged in the Indictment.

The first count charges that Appellant, with his co-defendant, R. B. Binger, in carrying on the alleged device scheme and artifice to defraud and the use of the mails to effectuate the same, organized several business trusts under the laws of the State of Oklahoma, *viz.,* the H. R. Edwards Comanche County, Oklahoma, Trust, the Edwards Indian Chief Trust, the Indian Chief Additional Development Trust, the Indian Chief Protection Lease Trust, and the Edwards Combined Trust, all holding divers and sundry interests in oil and gas mining properties and drilling wells thereon in Oklahoma and Texas.

The demurrer to the Indictment was duly presented to the court before plea to the Indictment, and was overruled by the court, and exception taken and allowed (R. 48).

ARGUMENT

(a) The Indictment was not signed by the Foreman of the Grand Jury.

As stated, *supra,* in the Statement of the Case, the Indictment appears to have been signed by John Brett, Assistant United States Attorney and endorsed by Ernest W.

Clarke "foreman," but not by the *foreman of the Grand Jury.* (R. 39.)

We do not know whether Ernest W. Clarke was foreman of the Grand Jury, foreman of the Federal Building, foreman of some W. P. A. project, or what. There is nothing whatsoever to indicate that he was the duly selected and acting foreman of the regularly qualified and empaneled Grand Jury that presented the purported Indictment.

In *United States* v. *Levally,* 36 Fed. 687 (D.C. W.D. Pa.), the court, in passing upon the sufficiency of an Indictment where the foreman of the Grand Jury simply wrote his name across the back of the Bill of Indictment, held the same insufficient and in connection therewith stated:

> "This case differs essentially from *State* v. *Freeman,* 13 N. H. 488; *Com.* v. *Smyth,* 11 Cush. 473; *Price's Case,* 21 Grat. 846, and other cases cited and relied on by the district attorney. In this court the practice is, and always has been, for the district attorney to prepare in advance the bills of indictment, and submit the same, with the evidence to support them, to the grand jury, whose action in each case, finding or ignoring the bill, is indorsed thereon, such indorsement being attested by the signature of the foreman thereunder. The foreman never signs his name at the foot of the bill, and the only written evidence of the action of the grand jury is the indorsement. The grand jury having brought the bill into court, in answer to the usual question hand the indictment to the clerk. The finding is not publicly announced, ther by the grand jury or the clerk, nor is any re ord thereof then made; but subsequently the clerk m kes the proper entry on the minute-book and docket from the indorsement on the bill. In the present case the foreman of the grand jury merely wrote his name in blank across the back of the

bill, under the date, 'Oct. 16, 1888.' It is quite impossible, then, to determine from anything that appears what the action of the grand jury really was. From this incomplete and insensible indorsement it cannot be assumed that the intention was to find the bill to be true. Nor are we at liberty, as suggested, to carry down the word 'indictment,' printed on the back of the bill, and treat it as part of the finding of the grand jury, even conceding (which we are by no means prepared to do) that the use of that word alone, under the ruling in *Sparks* v. *Com.*, 9 Pa. St. 354, would suffice. Nowhere upon the record is there any entry importing the finding of the bill as true. The words 'indictment filed' have no such significance, and the entry, 'a true bill,' upon the calendar or trial-list, prepared for the use of the judge, is a matter of no moment. Indeed, the clerk could not properly make any record of the finding of the bill as true, for no such finding was reduced to writing by the grand jury, or publicly announced by them in court. The sum of the matter, then, is that by an oversight the trial here erroneously proceeded, without it appearing in anywise that the bill of indictment had been found by the grand jury. Therefore the motion in arrest of judgment must prevail."

In *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, a similar question was presented to the court, however, in that case the court held that the objection, (cured here by demurrer) came too late to be raised in the Supreme Court. Attention is directed, however, to the following language of the court:

"There is in the Federal Statutes no mandatory provision requiring such indorsement or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such indorsement

and authentication were essential. 'The indorsement is parcel of the Indictment and the perfection of it.' *King* v. *Ford,* Yelv. 99."

It does not appear that the Foreman of the *Grand Jury* signed the Indictment herein, but, assuming him to have been the duly qualified foreman, he merely endorsed his name on the back of the Bill. There is nothing in the record to indicate what official capacity, if any, was held by the said Ernest W. Clarke in connection with the purported Indictment. It has been held that an endorsement on the back of a Bill of Indictment forms no part of the Indictment. See *Lee Choy* v. *United States,* 293 Fed. 582 (U.S. C.C. Hawaii); and *Wechsler* v. *United States,* 158 Fed. 579 (U.S. C.C. N.Y.).

We respectfully submit, therefore, that since the endorsement on the back of a Bill of Indictment forms no part of the Indictment itself, and that in the absence of the signature of the Foreman of the Grand Jury on the Indictment and in the absence of a showing that the said Ernest W. Clarke was actually Foreman of the Grand Jury, the demurrer to the Indictment should have been sustained on this point alone.

Counts 1 and 2 of the indictment were and are fatally defective in that the same wholly fail to negative the allegations therein contained and consist principally of conclusions and negative pregnants.

(b) Count three of the Indictment is defective for the reason that the same fails to charge wherein the omissions complained of were material and what the circumstances were under which the same were made.

Count three of the Indictment attempts to charge a violation of Section 17 (a) (2) of the Securities Act of 1933, as amended, (Section 77 q (a) (2), Title 15 U.S.C.A.) in that Appellant, in the sale of securities in the Edwards Indian Chief Trust, by use of the United States Mails, omitted to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made, not misleading. (R. 13-25).

The allegations in support thereof, in substance, are that Appellant, in the use of the United States Mails, referred to certain producing oil and gas fields around his properties, but that he failed to state that there were dry holes, or non-producing wells between his lease and said producing fields, but nowhere in the Indictment is it alleged *wherein* the failure to make reference to said non-productive wells was an omission of a material fact.

We respectfully submit that the omission to refer to non-productive wells between an anticipated field and other producing oil fields surrounding the anticipated field, has no bearing whatsoever on the question of whether oil will be produced in the anticipated field. This is a well known fact in the petroleum industry. In fact, the presence of dry holes in a general area, with the knowledge of the various strata passed through, is not only indicative of a producing oil structure, but, in most cases, is the *indicia* of production.

It is a well accepted principle in the petroleum industry that new oil fields are located and found by virtue of

the sub-surface data obtained from dry holes drilled around the new structure. There is no representation that the well being drilled by Appellant, referred to in the third count of the Indictment, was a part of any of the other producing fields, nor was there any representation that all of the pools together was just one oil field. There could be, therefore, no fraud in omitting to make reference to dry holes which were off-structure as it is well established in the Mid-Continent area that said dry holes are helpful in determining whether the location of a new well, such as Appellant was drilling, was on structure or not.

We respectfully submit, therefore, that the allegations of omission contained in the third count of the Indictment are simply the conclusions of the pleader and that the same state no fact or facts showing that the same were misleading, or that further disclosures should have been made by Appellant in the sale of the said securities. Consequently the demurrer to the third count of the Indictment should have been sustained. The defects of Counts 1 and 2 are obvious.

(c) Counts 4 and 5 of the Indictment are defective in that the same charge no violation of the law.

Count four of the Indictment charges Appellant with a violation of Section 5 (a) (1) of the Securities Act of 1933, as amended, (Section 77 e (a) (1) Title 15 U.S.C.A.) and count 5 of the Indictment charges a violation of Section 5 (a) of the Securities Act of 1933, as amended, (Section 77 e (a) (2), Title 15 U.S.C.A.) in the sale of securities in the Indian Chief Protection Lease Trust, the said counts alleging that said securities were sold and offered for sale

"there not then being in effect a registration statement filed with the Securities and Exchange Commission." (R. 25-27).

Section 5 (a) of the Securities Act of 1933, as amended, (Sections 77 e and 77 e, Title 15 U.S.C.A.) prohibits the use of the United States Mail or the use of Interstate Commerce to sell or offer for sale securities unless a registration statement is in effect, however, Section 3 (b), (Section 77 c (b) Title 15 U.S.C.A.) provides as follows:

> "The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000."

Pursuant to the foregoing provision of the law, the Securities and Exchange Commission duly promulgated and made effective, as a part of its general rules and regulations, Rule 200, which provided:

> "Subject to the conditions stated in this rule, the following securities are added, pursuant to section 3 (b) of the Act, to the classes of securities exempted as provided in section 3 (a) of the Act:
>
> "Any securities (other than those specified below) upon the condition that the aggregate offering price to the public shall not exceed the sum of $30,000: *Provided, however,* that the amount of the offering shall be reduced by the amount of any other offerings

(whether public or private), within one year prior to the offering herein exempted, of securities of the same issuer, or of any person controlling, controlled by, or under common control with such issuer, unless, or except to the extent that, such offerings have been withdrawn or have comprised securities (a) such as are described in section 3 (a) (3) of the Act or (b) issued in connection with the liquidation or the purchase or pledge of the assets of any national banking association and to which the provisions of title I of the Act do not apply by reason of any of the provisions of subsection (a) of section 3 thereof. The aggregate offering price of securities offered at the market shall be taken as the product of the number of units offered multiplied by the price per unit at which the securities were bona fide sold on the first day of sale. The aggregate offering price of any securities exchanged for bona fide outstanding securities or claims shall be determined as provided in rule 205.

"This rule shall not be applicable to exempt (1) certificates of deposit, except certificates of deposit or receipts issued pursuant to a plan and/or agreement under which such certificates of deposit or receipts are to be exchanged for bonds issued by the Home Owners' Loan Corporation and/or the net cash proceeds thereof: (2) securities exchanged for bona fide outstanding securities or claims; (3) voting trust certificates; or (4) overriding royalty interests, oil and/or gas payments, or fractional undivided interests in oil, gas, or other mineral rights."

This rule was in full force and effect at the time the mails were used by Appellant in said counts 4 and 5 of the Indictment. The provision of the rule, not exempting certificates of interest in trusts, did not become effective until March 1, 1938, by virtue of the adoption of the Commission

of Regulation B-T, which was subsequent to the use of the mails by Appellant.

Even though Section 5 of the Securities Act of 1933, requires the registration of certain securities, nevertheless Section 3 of the Act exempts from registration certain described classes of securities, including those exempted by the Commission under its General Rules and Regulations, where the issue is under the $100,000. Therefore, we respectfully submit that counts 4 and 5 of the Indictment are defective in that there is no allegation that the securities offered by Appellant were not in the class of securities exempted from registration under Section 3 of the Securities Act of 1933, and the Rules and Regulations of the Securities and Exchange Commission exempting various classes of securities as provided for by Section 3 (b) of said Act.

Rule 200 permitted the sale of securities, without registration up to $30,000, and other rules of the Commission permitted the sale of securities, without registration, upon complying with certain requirements up to $100,000. An allegation, therefore, to the effect that the accused sold securities without registration states no cause of action whatsoever. *It is no violation of the law to sell securities without registration.* The Act exempts certain classes of securities without registration and the rules and regulations promulgated under the Act exempts certain securities from registration and it is respectfully submitted that said counts of the Indictment are fatally defective and wholly fail to state a cause of action without alleging that the securities sold or offered for sale were of a class required to be regis-

tered and not exempt under the provisions of the law and the rules and regulations promulgated under said Act.

It is elementary that securities may be sold and offered for sale without there being in effect a registration statement.

We submit that the point raised is somewhat like that of the decisions of the courts in passing on the validity of indictments under the Harrison Narcotic Act. An indictment simply charging the possession of narcotics is invalid. There must be a charge that the accused was a person who had not registered and *who was required to register under the law.* In the instant case there is no allegation that the securities sold or offered for sale were of a class requiring registration. Securities coming under Secs. 3 or 4 of the Act do not require registration. *The burden of pleading is as much a duty of the government as the proof.*

In *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 60 L. ed. 1061, the Supreme Court of the United States affirmed the action of the trial court in quashing an Indictment wherein the accused was charged with the possession of narcotics, the Indictment failing to charge that the accused was a person *required to register* under the law.

The trial court in that case (225 Fed. 1003) states as follows:

> "The unlawful act, therefore charged against the defendant, is not the improper or unlawful dispensing of a drug, whether in good or bad faith, but consists in having in the possession and under the control of Martin certain drugs. The indictment, therefore, cannot be sustained, unless the having in the possession and under the control of Martin of certain drugs is an unlawful thing and a violation of the act of Congress.

"In reading the eighth section in connection with the remaining sections of the act of Congress, when it provides that it shall be unlawful for any person not registered under the provisions of this act to have in his possession certain drugs, I think that the word 'person' should be held to refer to the persons with whom the act of Congress is dealing; that is, the persons who are required to register and pay the special tax, in order to import, produce, manufacture, deal in, dispense, sell, or distribute. And there is no allegation in the indictment that Martin had in his possession these drugs for any of these purposes.

"The indictment, therefore, could not be sustained, unless the mere fact of having the drug in his possession is a violation of the law. If so, any person would be presumptively guilty and subject to indictment, and have the burden of proof cast upon him under this section, if he had any small amount of the prescribed drug in his possession, whether legitimate or otherwise."

The Supreme Court of the United States, through Mr. Justice Holmes, in the case, stated:

"Approaching the issue from this point of view we conclude that 'any person not registered' in Sec. 8 cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal,—*the persons who are required to register by Sec. 1.* It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument, taken by itself, for a broader meaning. But every question of construction is unique, and an argument in another. This exemption stands alongside of one that saves employees of registered persons, as do Secs. 1 and 4, and nurses under the supervision of a physician, etc., as does Sec. 4, and is so far vague that it may have had in mind

other persons carrying out a doctor's orders rather than the patients. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of, the proviso is not enough to overcome the dominant considerations that prevail in our mind."

See also *United States* v. *Wilson*, 225 Fed. 82; *United States* v. *Carney*, 228 Fed. 163; *Swartz* v. *United States*, 280 Fed. 115; and *Ex parte McGonigal*, 2 Fed. (2d) 784.

(d) Counts 6 to 10, inclusive, fail to charge Appellant with violation of any valid subsisting law of the United States, in that Section 338, Title 18, U.S.C.A., insofar as the same applies to the instant case, was repealed by the Securities Act of 1933 as amended.

Counts 6 to 10, inclusive, of the Indictment charge Appellant with a violation of Section 338, Title 18, U.S.C.A., i. e., with having devised a scheme and artifice to defraud and with the use of the United States mails to effectuate the same (R. 28-35).

The pertinent language in the mail fraud Statute, is as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of effecting such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office * * * to be sent or delivered by the post office establishment of the United States * * * shall be fined" etc.

The Securities Act of 1933, and particularly Section 17 thereof (Section 77 q, Title 15 U.S.C.A.) provides as follows to-wit:

> "(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
>
> "(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.
>
> "(c) The exemptions provided in section 77c shall not apply to the provisions of this section."

The mail fraud statute is the prior statute; the Securities Act is the latter one, and we respectfully submit that

insofar as the same is applicable to the sale or offer of sale of securities through the United States mails in carrying out and employing a fraudulent scheme as that described in the Indictment herein, the provisions of both statutes are substantially the same and that it was the intention of Congress in the amendment to the Securities Act of 1933, insofar as the same applies to the securities in question here, that the Mail Fraud Statute (Section 338, Title 18 U.S.C.A.) was and is repealed.

Attention is directed to the fact that when the Securities Act of 1933 was first enacted, Section 5 (c) thereof provided:

> "The provisions of this Section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single state or territory . . . ."

and that this provision was repealed in 1934, giving the Securities Act full control of the use of the mails whether interstate or intrastate, thus reflecting that it was the intention of Congress in that amendment that the Securities Act should repeal and supersede the mail fraud statute insofar as the same is applicable to securities of the type and class involved herein.

We realize that the District Court for the Northern District of Texas, in the case of *United States* v. *Alluan et al.*, 13 Fed. Supp. 289, held that the Securities Act of 1933 did not repeal the mail fraud statute and that the same view was taken by the Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Rollnick et al.*, 91 Fed. (2d) 911. With the holdings of these two courts, we cannot agree. They may have some persuasive effect on

this Court, but certainly are not binding and we submit that an analysis of the law can only lead to the conclusion that the mail fraud statute was repealed by implication by the enactment of the Securities Act of 1933.

In the Alluan case, the view is taken by the court that under the mail fraud statute the offense could be committed before any securities were sold and that the violation under the Securities Act was not completed until the sale actually took place. The court further held to the view that the punishment under the mail fraud statute was for the fraud itself the violation being complete without a sale, whereas, the punishment for the Securities Act was for the fruit of the fraud, requiring an actual sale. Of course, this view is not the law and is erroneous.

Section 17 of the Securities Act, as above quoted, refers to the employment of a device, scheme or artifice to defraud and the use of the mails or interstate commerce to effectuate the same. Section 5 of the Securities Act refers to the use of the mails in the sale of securities and Section 2 (3) of the Act (Section 77b (3) Title 15, U.S.C.A.) provides that the term "sale" shall include every *attempt* or offer to dispose of any security, that is, any letter, or writing, going through interstate commerce or the United States mails, just the same as in the mail fraud statute. There need be no actual sale to violate the Securities Act.

Where there are two acts of Congress on the same subject and the last embraces the provisions of the first, insofar as the same is applicable to a particular case before the court, the effect of the subsequent act is that of repealing the prior law by implication. See *United States* v. *Tynen*, 78 U. S. 95, 20 L. ed. 153.

We respectfully submit, therefore, that insofar as counts 6 to 10, inclusive, of the Indictment are concerned, the same charge no violation of any valid and subsisting law of the United States and that the demurrer to said counts should have been sustained by the trial court.

(e) Count 11 of the Indictment failed to state a cause of action against Appellant and should have been dismissed by the court.

Count 11 of the Indictment charges a violation of Section 88, Title 18 U.S.C.A., i.e., a conspiracy by and between Appellant and one R. B. Binger, to commit violations of the Securities Act of 1933, and of the mail fraud statute (Section 338, Title 18 U.S.C.A.) in the sale of securities in the various trusts named above. (R. 35-39).

There are no allegations in said count of the Indictment to the effect that the securities sold were of a class required to be registered with the Securities and Exchange Commission which, as presented, *supra*, we submit the allegations are too vague and indefinite and do not state a cause of action against Appellant.

It is to be noted that Appellant is charged with conspiracy with R. B. Binger and that on the 29th day of January, 1940, the same day Appellant was found guilty, the charges against the said R. B. Binger were dismissed on motion of Appellee, after he had entered his plea of *nolo contendere* (R. 50).

We submit, therefore, that this count should have been dismissed as to Appellant; that he cannot be convicted for having conspired with himself, and the dismissal, or acquittal of the defendant, Binger, automatically required the

dismissal or acquittal of Appellant. While this could not have been anticipated at the time of the presentation of the demurrer, nevertheless we say that the action of the court in finding Appellant guilty and sentencing him on the conspiracy count, was and is contrary to law and as to said count the judgment of the trial court should be reversed.

PROPOSITION NO. 3

(Specification of Error No. 4)

The Circuit Court of Appeals erred in affirming the judgment of the trial court in sentencing appellant to three years imprisonment on the eleventh count of the indictment, i. e., conspiracy; and the judgment as to the entire charge is contrary to law.

Appellant was charged and found guilty of a violation of the eleventh count of the indictment, i. e., conspiracy, and sentenced thereupon to serve three years in a penitentiary to be designated by the Attorney General.

Section 88, Title 18, U.S.C.A., provides that the maximum confinement for violation of this statute is *two years* instead of *three years* as appellant was sentenced.

The Circuit Court of Appeals (R. 72) takes the position, with reference to the eleventh count of the indictment; that since it is a good count, and since appellant's sentence was to run concurrently with other counts in the indictment, that the sentence of three years on the conspiracy count should stand. The opinion of the Circuit Court of Appeals, after holding that the eleventh count of the indictment was good stated that there was no need to explore the questions presented in connection with the other counts. We respectfully submit that the Circuit Court of Appeals erred in affirming the judgment of the trial court wherein appellant

was sentenced to serve three years on each count of the indictment (the same including the eleventh count), the court taking the view that said count was the *good* count of the indictment and the court failing and refusing to explore the questions presented as to the other or *bad* counts of the indictment.

Appellant was charged in the Indictment with various other offenses, as more fully set forth above, than those of which he was found guilty. There is no charge in the Indictment of Appellant's having used the United States mails in the sale of securities *with intention to defraud without having in effect a registration statement* filed with the Securities and Exchange Commission and, therefore, we respectfully submit that the court erred in finding Appellant guilty on any such purported violation or charge.

Counts 4 and 5 of the Indictment charge Appellant with having sold securities through the United States mails without having in effect a registration statement, but there is no charge of fraud in said counts whatsoever.

Clearly, counts 4 and 5 of the Indictment state no cause of action of violation of the law in that said counts merely charge Appellant with the sale of securities without having a registration statement in effect with the Securities and Exchange Commission, *without alleging that said securities were of a class requiring registration,* all as more fully argued and presented *supra*. For the reasons above stated, the demurrer to said counts should have been sustained and the judgment and sentence of the court should be reversed.

The judgment and commitment of the court, with reference to the foregoing, reads as follows:

"The defendant having been convicted on his plea of nolo contendere to the offenses charged in the indictment in the above entitled cause, to-wit: Using United States Mails in sale of certain securities with intent to defraud without having in effect a registration statement, filed with the Securities and Exchange Commission; and Conspiracy in using United States mails in furtherance of scheme to defraud; * * *." (R. 49-50).

There is no such charge in the indictment, outside of the conspiracy count, on which the judgment and sentence of the trial court, supra, *was rendered.*

It is, therefore, respectfully submitted that the judgment of the trial court and the affirmance thereof by the Circuit Court of Appeals is contrary to law and that the judgment should be reversed.

PROPOSITION NO. 4

(Specification of Error No. 5)

The Circuit Court of Appeals erred in receiving in evidence, de novo, over the objection of appellant, certain exhibits and evidence not included in the record on appeal.

We think the facts with reference to this proposition have been sufficiently stated, *supra,* however, it will be recalled that at the time of the presentation of the argument of counsel herein before the Circuit Court of Appeals, the court received in evidence, over the objection of appellant (R. 52-69), an affidavit of an Assistant United States Attorney and a purported transcript of the testimony of appellant before the Securities and Exchange Commission. These exhibits and this evidence were received by the Circuit Court of Appeals, *de novo,* and neither was included in the record on appeal.

First of all, it is respectfully submitted that an affidavit is not even admissible in the trial court, much less in the Appellate Court, as original evidence. See *Holt* v. *United States*, 94 Fed. (2d) 90, (C.C.A. 10th). Neither was the purported transcript admissible, which was not a part of the record on appeal, there being no test made of its correctness or authenticity and the same wholly failing to show that it was certified to by the Court Reporter.

There was no proof of the authenticity of the purported record—there was no right of cross examination—appellant was not given his constitutional right of being *confronted* with witnesses.

Section 212, Title 28, U.S.C.A. (Sec. 117 of the Judicial Code) provides as follows:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, *with appellate jurisdiction*, as hereinafter limited and established."

It has been repeatedly held that the Circuit Courts of Appeals have no original jurisdiction and that their jurisdiction is appellate only, except in such cases as may be necessary to carry out such appellate jurisdiction. See *Whitney* v. *Dick*, 202 U. S. 132; *United States* v. *Mayer*, 235 U. S. 55; *Travis County* v. *King Iron Co.*, 174 U. S. 801; *Fowler* v. *Seymour*, 95 Fed. (2d) 627 (C.C.A. 9th 1938); *Millers Mut. Fire Ins. Ass'n* v. *Warroad Potatoes Growers Ass'n*, 94 Fed. (2d) 741 (4th C.C.A.; 1938); *Hill* v. *Douglass*, 78 Fed. (2d) 851 (C.C.A. 9th 1935).

In *Hali* v. *United States*, 78 Fed. (2d) 168 (10th C.C.A. 1935), the same Circuit Court of Appeals, from which a review is sought herein, stated as follows:

> "*The jurisdiction of the Circuit Courts of Appeals is purely appellate, and they have no original jurisdiction* except such as is necessary to aid, protect, or enforce their appellate jurisdiction. *United States* v. *Mayer*, 235 U. S. 55, 65, 35 S. Ct. 16, 59 L. Ed. 129; *Frankel* v. *Woodrough* (C.C.A.) 7 F. (2d) 796, 797; *Whitney* v. *Dick*, 202 U. S. 132, 137, 26 S. Ct. 584, 50 L. Ed. 963. For us to entertain a motion for a new trial filed in the District Court, would be to exercise original, not appellate, jurisdiction.
>
> "The proper procedure is indicated in *Roemer* v. *Simon*, 91 U. S. 149, 150, 23 L. Ed. 267, where the court said: 'It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. *No new evidence can be received here.*'" (Italics supplied).

Attention is also directed to the language of the Court of the Fourth Circuit Court of Appeals in *Stephenson* v. *Equitable Life Assur. Soc.* v. *United States*, 92 Fed. (2d) 406, wherein the court had to say at page 410:

> "As the judge below did not pass upon the merits of the case but dismissed it for lack of jurisdiction, and there is no assignment of error relating to the merits, we cannot pass upon the merits here. In reversing the dismissal on the jurisdictional point there is nothing that we can do but remand the cause for further proceedings. We have been urged to interpret the incontestable clause of the policy; but our powers are solely those of an appellate court, and we can pass on the merits of a cause only by way of review."

See also *Chisholm-Ryder Co., Inc.* v. *Buck*, 65 F. (2d) 735 (C.C.A. 4th 1933).

We respectfully submit, therefore, that the Circuit Court of Appeals erred in receiving and considering in evidence, *de novo*, the foregoing evidence, none of which was included in the record on appeal, and none of which was admissible in the Appellate Court.

The statutes and the authorities are clear that the Circuit Court of Appeals, in cases such as the instant one, are not courts of original jurisdiction but are simply Appellate Courts and therefore the Circuit Court erred in receiving in evidence the foregoing exhibits over the objection of appellant with no opportunity on his part of testing the accuracy of the same, as by law provided, in the trial court.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the judgment and sentence of the trial court was and is erroneous and that the judgment of the Circuit Court of Appeals for the Tenth Circuit herein affirming said judgment should be in all things reversed and the indictment herein ordered dismissed and appellant discharged.

Respectfully submitted,

J. Forrest McCutcheon,
1005 Texas Bank Building,
Dallas, Texas,
Attorney for Appellant.